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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

CITIZENS UTILITIES WATER COMPANY OF ARIZONA, an *ARIZONA CORPORATION*,

Petitioner,

v.

THE SUPERIOR COURT OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF PIMA; THE HONORABLE JACK G. MARKS, a JUDGE THEREOF; and the CITY OF TUCSON, a municipal corporation,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

OPINIONS BELOW

The opinion of the Arizona Supreme Court is reported at 497 P.2d 55, and appears verbatim in petitioner's appendix, (A.1 - A.11).

JURISDICTION

Petitioner accurately states the dates that events occurred and the statutory provisions that might confer jurisdiction on this Court to review this matter by a writ of certiorari.

As will later appear in this Brief In Opposition, this Court does not have jurisdiction under 28 U.S.C. §1257(3) to review the opinion of the Supreme Court of Arizona because:

1. There is no final judgment or decree rendered by the highest court of the State of Arizona, and,

2. None of the requirements of 28 U.S.C. §1257(3) that are prerequisites to a review by writ of certiorari have been shown by the petitioner to exist, and in fact do not exist.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner claims some infringement on its Fourteenth Amendment right to due process of law. It makes no claim that either *Ariz. Rev. Stat. Ann.* §9-511 (1956) or Art. II, §17 of the Arizona Constitution are repugnant to the Fourteenth Amendment to The United States Constitution or any other provision of The United States Constitution.

QUESTIONS PRESENTED

Petitioner apparently intends to tender two questions to the Court:

1. Can a municipality condemn a public utility's property if the property is located outside the municipality's corporate limits, not all interconnected or connected to property inside the corporate city limits, and not used, or necessary, to serve the city or inhabitants of the city, without violating the public utility's right to due process of law under the Fourteenth Amendment to The Constitution of the United States?

2. Did the reference in its opinion by the Supreme Court of the State of Arizona to certain testimony excluded by the state trial court violate petitioner's right to due process of law under the Fourteenth Amendment to The Constitution of the United States?

STATEMENT OF THE CASE

The petitioner has stated accurately the course that this litigation took below, and for the most part has accurately stated the facts.

Some conclusions reached by petitioner in its statement as to whether a Federal question was propely raised below, or raised at all for that matter, and conclusions as to how the state court treated the Federal question below are patently erroneous.

REASONS FOR DENYING THE WRIT

1. THIS COURT DOES NOT HAVE JURISDICTION TO GRANT A WRIT OF CERTIORARI BECAUSE:

   A. **There was no final judgment or decree rendered by the highest court of the State of Arizona, and,**

   B. **None of the requirements of 28 U.S.C. §1257(3) that are prerequisites to a review by this Court by writ of certiorari have been shown by petitioner to exist; they in fact do not exist.**

2. THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI.

   A. **There was no final judgment or decree rendered by the highest court of the State of Arizona.**

28 U.S.C. §1257 confers jurisdiction on this Court to review final judgments or decrees rendered by the highest court of a state. This limitation applies to a review by either an appeal or by a writ of certiorari.

While petitioner refers to memorandum opinions, and orders of the trial court, no suggestion is made that these orders are of the highest court of the State of Arizona or otherwise subject to review here. One must assume that their presence in the record is for the purpose of aiding petitioner in its claim that a Federal question was either raised or decided below. We should, therefore, be concerned only with the opinion of the Supreme Court of the State of Arizona set out in the Appendix to the petition. (A.1 - A.11)

That there is no final judgment or decree in the case is apparent from the record. The opinion of the Arizona Supreme Court and its order of the 12th of May, 1972, Petitioner's Appendix A.1 - A.11, Petitioner's Appendix A.12 - A.13, refer to the trial court's order as a judgment. It would serve no useful purpose to attempt to put another label on the trial court's order. Suffice it to say that the record is quite clear that the order or judgment is not final. The trial court ordered a trial on the issue of damages. The Arizona Supreme Court affirmed that order and there is to be a jury trial on the issue of damages; and until that is had, the jurisdictional requirement of 28 U.S.C. §1257 that there be a final judgment or decree has not been met.

The jurisdictional requirement of finality has long been with us and is not to be easily scorned. *Montgomery Bldg. & Const. Trades Council et al. v. Ledbetter Erection Co., Inc.* 344 U.S. 178 (1952). Overruled on other grounds. *Local No. 438 Construction & General Laborers Union, AFL-CIO v. Curry*, 371 U.S. 542 (1963).

The requirement of finality is not absolute and may be met under some circumstances where further action is to be had in the lower court. Cf. *Local No. 438 Construction & General Laborers Union, AFL-CIO v. Curry*, 371 U.S. 542 (1963) and *Mercantile National Bank at Dallas v. C. H.*

Langdeau Republic National Bank of Dallas, 371 U.S. 555 (1963).

Notwithstanding this there are no circumstances here that even suggest that the general requirement of finality should be waived. This feature of the case seems to be controlled by the holding in *State of Washington ex rel. Grays Harbor Logging Company and W. E. Beoing v. Coats - Fordney Logging Company*, 243 U.S. 251 (1917). In this case that part of the judgment of the state court giving the condemnor the right to take the property was final. But, as in this case the amount of compensation had not been fixed and this Court held that judgment not to be final.

B. None of the requirements of 28 U.S.C. §1257(3) that are prerequisites to a review by this Court by writ of certiorari have been shown by petitioner to exist; they in fact do not exist.

28 U.S.C. §1257(3) establishes jurisdictional requirements for review by writ of certiorari. A brief analysis of these requirements laid beside the allegations of the petition quite clearly indicates that this Court does not have jurisdiction to grant a writ of certiorari.

The validity of a statute or treaty of the United States is not in question. No state statute or other provision of state law is claimed to be repugnant to the constitution, treaties, or laws of the United States. The opinion of the Supreme Court of Arizona (Petitioner's Appendix A.1 - A.11) refers to the various Arizona statutes that give the City of Tucson the power to condemn petitioner's property. At no time does petitioner claim that any law of the State of Arizona is repugnant to The United States Constitution.

In the petition there are some rather vague references to the raising of a constitutional question below, but petitioner has made no real attempt to set out what Federal question was raised or just how it was raised.

Since no statute, state or federal, or other state law is claimed to be repugnant to The United States Constitution, it would seem that the only possible claim that petitioner could assert is that some title, right, privilege or immunity referred to in 28 U.S.C. §1257(3) has been violated. The specific provision that petitioner invokes is the due process of law clause of the Fourteenth Amendment. Petitioner's Question Presented 2., while not cutting to the heart of the question, hacks at a claim that there was a procedural violation of due process by the Arizona Supreme Court's reference to testimony that was in the record as an offer of proof after the trial court sustained an objection to the testimony.

28 U.S.C. §1257(3) is, of course, broad enough to cover such a claim. We should then ask what petitioner says about how the question was raised below. Petitioner sayeth naught. Indeed petitioner can say nothing on this score because the record below clearly demonstrates that petitioner made no claim of a Fourteenth Amendment violation in connection with the Supreme Court's reference to the testimony in question.

The first time the petitioner could have raised that question would have been in its Motion for Rehearing. In its Motion for Rehearing, page 5, petitioner complains that the proposed acquisition of its property by the City of Tucson was not a taking for public use within the meaning of the Fourteenth Amendment to The United States Constitution.

Later in this Motion for Rehearing, petitioner claimed that the Arizona Supreme Court did not consider whether the proposed acquisition by the City of Tucson violated the Fourteenth Amendment, contending that the issue had been properly raised. At no time did petitioner even hint that the manner in which the Supreme Court handled the testimony contained in the offer of proof violated the due process clause of the Fourteenth Amendment to The United States Constitution.

It is crystal clear that at no time did the petitioner claim that the Arizona statutes that gave the City of Tucson power to condemn were repugnant to The United States Constitution. At no time did petitioner claim that Art. II, §17 of the Arizona Constitution which petitioner claimed had been violated was repugnant to any provision of The United States Constitution.

It would, therefore, be an imposition on this Court to demonstrate that the Arizona Supreme Court did not err in its treatment of this case.

Rule 23(f) of the Supreme Court Rules specifically requires a petition for a writ of certiorari to show precisely and in some detail when and how the Federal question was raised. This requirement was not overlooked by petitioner. It was not met because the record does not show that the Federal question was timely and properly raised.

If the record does not reveal a properly presented Federal question that the lower court decided, this Court should decline to take jurisdiction. See *Bailey v. Anderson, State Highway Commissioner of Virginia*, 326 U.S. 203 (1945).

When the highest state court fails to pass on a Federal question, it should be assumed by this Court that the omission was due to want of proper presentation to the state court, unless the complaining party shows to the contrary that the Federal question was properly and timely raised below. *Street v. New York*, 394 U.S. 580 (1968).

It is too clear for extended argument that no Federal question was timely and properly raised in the state court.

2. THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI.

A review on writ of certiorari is not a matter of right but of sound judicial discretion, *Ireland v. Woods*, 246 U.S. 323 (1917), and may be denied in cases where the power to issue it is unquestionable, *Hyde v. Shine*, 199 U.S. 62 (1904). Supreme Court Rule 19 provides that a writ of certiorari

will be granted only where there are special and important reasons therefor. While the power to issue the writ is a comprehensive and unlimited one, *Forsyth v. City of Hammond*, 166 U.S. 506 (1897), it is to be exercised sparingly and only in cases of gravity and importance, *J. I. Case Company v. The National Labor Relations Board*, 321 U.S. 332 (1944), *Rogers v. Helvering*, 320 U.S. 410 (1943), since if carelessly exercised, it might defeat the very purpose of the act creating the Supreme Court.

Petitioner spends some time expressing its concern over the plight of the residents and non-residents of the city. Petitioner fears that in case of a water shortage that non-residents will be without water. Petitioner laments the fact that there is no regulation of the city by the Arizona Corporation Commission leaving non-residents served by the city without a place to take their grievances relating to reasonableness of rates and adequateness of service. Petitioner is also concerned because non-residents may not vote in municipal elections. Petitioner, however, completely neglects to inform the Court what these possible problems of the general citizenry have to do with any of its constitutional rights. Much of petitioner's argument of its "Reason One" for granting the writ deal with why the Supreme Court of Arizona incorrectly decided the case below. While a most casual reading of the opinion of the Arizona Supreme Court would convince one that the decision is sound in all respects, that is immaterial here. It goes without saying that jurisdiction on certiorari will not be conferred merely to give the defeated party in the lower court another hearing or merely to review the evidence or inferences drawn from it. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175 (1937). There seems to be no clear cut definition of what the term "special and important reasons" means, but it would seem that petitioner would be obligated to call to the attention of the Court some reason of importance that would justify the granting of a petition for writ of certiorari. Petitioner has made no attempt to point out why this cause is of particular significance.

CONCLUSION

A litigant who attempts to use a writ of certiorari to be heard in this Court should clearly demonstrate that the Court has jurisdiction and that there are special and important reasons for granting the writ. Giving petitioner every benefit of the doubt, it appears conclusively from the record herein that this Court does not have jurisdiction to grant a writ of certiorari. It also clearly appears from the record that there is no special or important reason why this Court in its discretion should grant a writ of certiorari.

Respondent, City of Tucson, respectfully urges that the petition for a writ of certiorari be denied.

Respectfully submitted,

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